

In the Matter of the Application of

SEADRIFT RANCH PARTNERS, LTD.  
TCEQ Permit No. WQ0014716001

Before the

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERK'S OFFICE

2008 FEB - 1 PM 12: 49

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**APPLICANT'S RESPONSE TO REQUESTS  
FOR HEARING AND RECONSIDERATION**

Seadrift Ranch Partners, Ltd. ("Applicant") files this Response to the Requests for Hearing and Reconsideration ("Response") on its application for Permit Number WQ0014716001 in accordance with section 55.209(d) of the procedural rules of the Texas Commission on Environmental Quality ("Commission"). 30 TAC § 55.209(d).

**I. Introduction**

The Applicant has applied for a new permit to discharge treated domestic wastewater from a new facility to serve the Bay Club at Falcon Point Subdivision. The facility will be located 3,600 feet southeast of the intersection of Swan Point and Falcon Point Roads in Calhoun County, Texas.

The facility will discharge wastewater at a daily average flow not to exceed a 25,000 gallons per day to a storm water detention/retention pond; then to an unnamed lake; then to the San Antonio Bay/Hynes Bay/Guadalupe Bay in Segment No. 2462 of the Bays and Estuaries.

The storm water detention/retention pond and unnamed lake are unclassified waters with limited aquatic life uses. The designated uses for Segment 2462 are contact recreation, oyster waters, and exceptional aquatic life uses. Segment 2462 is on the State's 303(d) inventory of impaired and threatened waters. The listing is specific to bacteria in oyster waters.

**II. Procedural History**

The Applicant applied for Permit No. WQ0014716001 on May 12, 2006. The application was deemed administratively complete on June 10, 2006. Notice of Receipt and Intent to Obtain a Water Quality Permit was published on August 2, 2006, in *The Port Lavaca Wave*. The Notice of Application and Preliminary Decision ("NAPD") was mailed to persons on the adjacent landowner list on October 12, 2006, and published on November 15, 2006, in *The Port Lavaca Wave*. The initial public comment period ended on December 15, 2006, and the Executive Director ("ED") filed its Response to

Comments on June 1, 2007. The ED and Public Interest Counsel ("PIC") each filed their Responses to Hearing Requests on August 27, 2007.

The Chief Clerk thereafter discovered that it had inadvertently mailed the NAPD to only one of three pages of adjacent landowners. On September 20, 2007, therefore, the Chief Clerk mailed the NAPD to all adjacent landowners and extended the comment period to thirty days from September 20th (October 15, 2007). The Executive Director filed an Amended Response to Comments on November 8, 2007.

### **III. Response to Hearing Request**

#### ***A. Summary of Applicant's Position***

Responses to hearing requests must address seven elements listed in section 55.209(d) of TCEQ's procedural rules. Applicant's position with respect to each element is summarized after the description of the element below.

- (1) whether the requester is an affected person;

For the reasons set out in Part III.B of this Response, none of the persons who have requested a hearing are "affected persons" entitled to request a hearing.

- (2) which issues raised in the hearing request are disputed;

The issues in dispute are identified in Part III.C of this Response; however, the issues raised by the hearing requesters should not be referred to the State Office of Administrative Hearings ("SOAH") at all and, if referred, should be rewritten to correctly state the applicable legal standard..

- (3) whether the dispute involves questions of fact or of law;

The issues raised in the hearing requests variously involve questions of fact, questions of law, and mixed questions of fact and law.

- (4) whether the issues were raised during the public comment period;

The issues raised in the hearing requests were raised during the public comment period.

- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;

The issues raised in the hearing requests are not based on a public comment withdrawn by the commenter in writing.

- (6) whether the issues are relevant and material to the decision on the application;

For the reasons discussed in Part III.C of this Response, a number of the issues raised in the hearing requests are not relevant and material to the decision on the application. To the extent that the Commission refers any issues to SOAH for hearing, the Applicant requests that the number of issues be limited as described in Part III.C (and summarized in Part III.D) of this Response and rewritten as set out those parts.

- (7) a maximum expected duration for the contested case hearing.

If the Commission refers the matter to SOAH, the Applicant anticipates a maximum duration for the hearing of six months from the date of the preliminary hearing until presentation of a proposal for decision before the Commission.

#### ***B. Failure to Show Affected Person Status***

Only an affected person can request a contested case hearing. Section 55.203 defines an “affected person” as “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” However, “an interest common to members of the general public does not qualify as a personal justiciable interest.” 30 TAC § 55.203(a). In determining whether a person is an “affected person,” the Commission must consider:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (6) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

For the reasons discussed below, none of the persons requesting a hearing are “affected persons” within the meaning of TCEQ’s rules. To the extent that any hearing requester has stated a personal interest any issue, the issue raised is not one protected by the law under which a wastewater application is to be considered, is not reasonably related to the regulated activity, is related to an interest shared in common with the general public, or is an issue about which there is no legitimate factual dispute. None of these issues can support “affected person” status.

The Applicant takes the statements in the hearing requests as true for the purposes of this Response. The Applicant reserves the right challenge these statements at hearing and to raise additional issues of fact or law with respect to the hearing requester’s “affected person” status during the hearing phase, if the Commission refers the application to hearing.

### **1. Virginia Cervenka**

Virginia Cervenka states that she owns waterfront property and that the unnamed drainage ditch, through which state surface water containing the proposed discharge will run from the stormwater detention/retention ponds to the bay, is on her property. She says that she is affected by the proposed discharge because of purported flooding that she attributes to the Falcon Point subdivision development. The Applicant does not concede that Ms. Cervenka is experiencing unusual flooding problems or that any such problems are attributable to the Falcon Point development. In any event, control of flooding due to storm water runoff due to development on upstream property is not an interest protected by the Texas water quality permitting program or any other law applicable to Applicant’s wastewater discharge permit.

Ms. Cervenka also states that there is silt in the runoff. Seadrift does not concede that unusual siltation is occurring or that it is attributable to the Falcon Point Ranch development if it is. In any event, if siltation were occurring, it would be the subject of TCEQ’s stormwater general permits and/or local control and not relevant to the law applicable to Applicant’s domestic wastewater discharge permit.

Ms. Cervenka states that she is concerned about odor from the facility. TCEQ has promulgated a rule to control nuisance odor in section 309(e) of its Domestic Wastewater Plant Location Standards. This rule requires a facility to meet any one of three criteria to satisfy TCEQ’s nuisance odor standard, the first criteria being adequate buffer zones. There can be no legitimate dispute that the facility meets the buffer requirements with respect to Ms. Cervenka’s or any other property. Therefore, there is no legitimate, factual issue in dispute for hearing on this issue.

Ms. Cervenka states that she is concerned about water quality in the bay and wildlife. Compliance with water quality standards previously established by TCEQ to be protective of human health and the environment (including wildlife) is a relevant consideration under the law governing the Commission’s consideration of the wastewater discharge application. To the extent that Ms. Cervenka is concerned about compliance with applicable water quality standards, however, she is stating a concern that she shares

in common with the general public. A concern shared in common with the general public does not establish her status as an "affected person."

Finally, the ED noted in its August 27, 2007, Response to Hearing Requests ("ED's 2007 Response") that Ms. Cervenka is on the so-called "affected landowners" list. The ED's 2007 Response refers to a list submitted by Applicant's consultant as part of the permit application for the facility. The TCEQ refers to this list as the "affected landowners" list. TCEQ's rules require an applicant to identify "the ownership of the tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge." 30 TAC § 305.48(a)(2). TCEQ's instructions for applications for domestic wastewater discharge permits define the "reasonable distance" broadly to include all landowners within one stream mile of the discharge point to the unnamed ditch (which is on Applicant's property) and all landowners within one-half mile in each direction of the discharge to the bay. Identification of a landowner on the adjacent landowner's list, however, merely entitles the landowner to receive certain notices by mail. It does not in and of itself establish that person's standing as an "affected person."

The issues raised by Ms. Cervenka are not protected by the law under which a wastewater application is to be considered, are not reasonably related to the activity regulated under the permit, or are issues relating to an interest shared in common with the general public, or are issues about which there is no legitimate factual dispute,. The Commission should, therefore, decline to refer the application to SOAH on the basis of Ms. Cervenka's request for hearing.

## **2. Daniel Cervenka**

Daniel Cervenka raises the same issues as Virginia Cervenka with respect to the same real property. For the reasons discussed above, the Commission should decline to refer the application to SOAH on the basis of Mr. Cervenka's request for hearing.

## **3. Dudley and Patsy Garrett**

Dudley and Patsy Garrett submitted a joint hearing request in which they state that they own two tracts of land at Swan Point. The Garretts state two purported personal interests to justify "affected person" status. The first is that they are on the so-called "affected landowner" list. As discussed above, listing on the list of adjacent landowners required by TCEQ's rules does not in and of itself justify "affected landowner" status. The second basis is that they fish off a pier on their property, and they believe that they have observed a "detrimental impact" to vegetation after rains cause fresh water to enter the bay, which they are concerned will impact fishing. As discussed previously, the impact of storm water runoff is not reasonably related to the activity regulated under the permit (domestic wastewater treatment effluent discharge).

Other issues raised by the Garretts are shared in common with the general public and do not establish their "affected person" status.

The Commission should not refer the application to SOAH based on the Garrett's request for hearing.

#### **4. Jeffrey and Terri Kubena**

Jeffrey and Terri Kubena submitted a joint hearing request. They state that the water treatment plant is 600 feet from their property. As discussed above, listing on the adjacent landowner list does not by itself justify "affected person" status. Other than proximity to the facility, the issues they raise include property value, which is not an interest protected by the law under which the application will be considered; concern about fishing, wildlife, and swimming in the bay, which are interests shared in common with the general public; and hurricane preparedness, which is not an interest protected by the law under which the application will be considered. The Kubenas also expressed a preference for irrigation systems, which is not a relevant consideration under the law governing the application. The Commission should not refer the application to SOAH based on the Kubenas request for hearing.

#### **5. Franklin Pierce**

Franklin Pierce states that he lives 3/8 of a mile from the discharge point. As discussed above, listing on the adjacent landowners list does not in and of itself establish "affected person" status. To justify "affected person" status, Mr. Pierce states that the proposed discharge would decrease his property value and make the water unsafe for water sports. Potential affect on property value is not an interest protected by the law under which the application will be considered. The impact of the proposed discharge on water sports is a concern shared in common by the general public and is not a personal interest sufficient to establish "affected person" status. The Commission should not refer the application to SOAH based on Mr. Pierce's request for hearing.

#### **6. Rick Dierlam**

Rick Dierlam owns property approximately a mile from the proposed plant and roughly 1,500 to 2,000 feet from the proposed discharge point. Mr. Dierlam is, therefore, included on the adjacent landowners list. As discussed above, however, listing on the adjacent landowners list does not by itself establish "affected person" status. Issues raised by Mr. Dierlam include concern for water quality due to wind-influenced water in the Sandy Point area; smell; future growth in plant capacity; and a preference for a different location. Concern for water quality is a concern shared in common with the general public and does not justify "affected person" status. With respect to smell, the facility conclusively meets the buffer zone option in TCEQ's nuisance odor rule, 30 TAC § 309(e), and, therefore, there is no factual dispute for hearing. With respect to moving the facility, TCEQ has no authority to require the Applicant to evaluate alternative locations, and thus moving the facility is not a concern protected by the law under which the application will be considered. Future growth in plant capacity, if any, would be the subject of a future application and future evaluation by the TCEQ water quality permitting division. Future capacity increases are, therefore, not related to the activity

regulated by the permit (a 25,000 gpd discharge) and are not relevant and material to the Commission's decision on the 25,000 gpd discharge permit currently before it.

For the foregoing reasons, the Commission should not refer the application to SOAH based on Mr. Dierlam's request for hearing.

#### **7. Greg and Christie Waida**

Greg and Christie Waida filed a joint hearing request. They live within the area covered by the adjacent landowners' list. As discussed above, inclusion on the adjacent landowners' list does not by itself establish "affected person" status. As personal justiciable interests, they claim that the facility will interfere with their right of quiet enjoyment, economic value of their property, and "legal privilege" to swim and fish in the bay adjoining their property. A right of quiet enjoyment is a real property right to continue to occupy property. The proposed facility and discharge cannot reasonably be expected to interfere with that right and, in any event, the covenant of quiet enjoyment is not a right protected by the law under which the current application will be considered. The impact of the proposed facility on property values is similarly not an interest protected by the law under which the application will be considered. Finally, the impact of fresh water inflow on swimming and fishing in the bay about which the Waidas express concern is a concern shared by the general public and one that arises, if at all, from storm water runoff during rain events, not small quantities of treated domestic wastewater discharge. The impacts, if any, of storm water runoff are not related to the activity being regulated under the permit and cannot, therefore, confer "affected person" status.

The Commission should not refer the application to SOAH based on the Waida's request for hearing.

#### **8. Carol Garriot**

The address provided on Carol Garriott's request for hearing is 2.7 miles from the proposed facility. Her request states only concerns shared in common with the general public. Ms. Garriott does not state any personal justiciable interest in the application. The Commission should not refer the application to SOAH based on Ms. Garriott's request.

A person is entitled to request a contested case hearing on the application only if that person is an "affected person." 30 TAC 55.201(b)(4). The hearing requesters in this case have in each case failed to allege a personal justiciable interest in that they have failed to allege an interest that is protected by the law under which the application is to be considered, failed to allege an interest that is reasonably related to the activity regulated under the permit, or failed to identify a factual dispute for hearing. For the reasons discussed above, therefore, the Commission should deny the requests for hearing and grant the application.

In the event, however, that the Commission grants the hearing requests, the Applicant addresses the number and scope of the issues for hearing below. Applicant

discusses the number and scope of the issues without waiving any further objections it may have to requesters "affected party" status in the event the matter is referred to hearing, whether or not such objections are stated in this Response.

### **C. Issues Not Referable to SOAH**

On August 27, 2007, the ED and Public Interest Council ("PIC") each filed a Response to Hearing Request in this matter. The ED identified eighteen issues of which it recommended nine be referred to the ED. The PIC identified eleven issues, of which it recommended all eleven be referred to the PIC. Applicant believes that the ED's and PIC's responses comprehensively identified all of the issues that could reasonably be gleaned from the comments and hearing requests. Applicant would be surprised if the ED or PIC were to identify new issues in their additional Responses to Hearing to be filed by February 1, 2008. Applicant therefore responds below to the formulation of the issues filed by the ED and PIC on August 27, 2007.

Applicant's objections to the ED's and PIC's recommended referrals fall into two categories.

First, the ED or PIC, or both, recommend referring issues to SOAH that are not relevant and material to the Commission's decision under the law governing the application or do not involve disputes of fact, and these issues should not be referred.

Second, the ED or PIC, or both, recommend a number of issues for referral that ask generally whether the proposed discharge will have an impact on, *e.g.*, water quality, human health, the aquatic environment, wildlife, swimming, fishing, recreational activities, and so on. The ED's and PIC's formulations of these issues are too broad. The ED and PIC justify their broad formulations by stating generally that the "issue is within TCEQ's jurisdiction" (for the ED) or "concerns the Texas Water Quality Standards found in 30 TAC Chapter 307" (for the PIC). *See* ED's 2007 Response at 6-10 (Issues 2, 4, 6-9, 15-16); PIC's 2007 Response at 8-10 (Issues 1, 3-6, 9-10).

Although issues concerning the impact of a proposed discharge on water quality may be within TCEQ's jurisdiction, TCEQ has already exercised its jurisdiction over many of the issues raised by the hearing requesters by promulgating the Texas Water Quality Standards and wastewater permitting standards that are protective of water quality and other environmental values. If any issues are referred for hearing, therefore, they should be formulated specifically to determine whether the application meets the relevant water quality and permitting standard previously promulgated by TCEQ after notice and opportunity to comment. Otherwise, Applicant's individual permit process has the potential to become a referendum on the adequacy of the Commission's previously promulgated standards. The regulated community needs to be able to rely on the promulgated standards and the guidance they provide on the contents of a permit application. If the hearing requesters have legitimate concerns about the protectiveness of the relevant standards, their recourse is to petition TCEQ for a rulemaking setting more stringent standards, not to challenge the promulgated standards in an individual permit proceeding. *See, e.g.*, 30 TAC § 20.15 (petitions for rulemaking); *id.* § 307.2(d)



(modification of water quality standards). To prevent this misuse of the individual hearing process, the Commission should ensure that the issues it refers, if any, state the correct legal standard.

The Applicant addresses the relevance and formulation of each issue identified in the ED's 2007 Response below. The corresponding issue identified in the PIC's 2007 Response, if any, is addressed at the same time. The Applicant makes these responses on the issues without waiving any objection of fact or law it may have to the referral of any issue, whether or not such objection is stated in this Response.

1. ED Issue #1: Whether the Applicant should build an irrigation system?

The ED recommended that this issue not be referred to SOAH because TCEQ does not have the authority to require Applicant to consider a different wastewater disposal system than the one for which it applied. The PIC did not identify this as a disputed issue. The Applicant concurs that his issue should not be referred to SOAH for hearing.

2. ED Issue #2: Whether this discharge into San Antonio Bay will threaten marine life, and the ecological health of the bay?  
PIC Issue #1: Will the proposed discharge adversely affect wildlife in and around San Antonio Bay, including fish, whooping cranes, and blue crabs?

The ED justifies referral of this issue on the summary basis that it is "within TCEQ's jurisdiction." The PIC justifies referral on the grounds that "[t]his issue involves the Texas Surface Water Quality Standards found in 30 TAC Chapter 307 and is therefore relevant and material to the Commission's decision on this application." In light of the lack of "affected party" status of the hearing requesters raising this issue, the issue should not be referred to SOAH. In any event, for the reasons discussed above in Part III.C of this Response, Applicant contends that this issue has been too broadly stated by the ED and PIC. If this issue is referred at all, it should be formulated to specifically inquire if the application meets water quality and permitting standards previously promulgated by TCEQ relevant to the issue, as follows:

Whether the proposed discharge meets applicable water quality and domestic wastewater discharge permitting standards relevant to the protection of wildlife and marine life in the San Antonio Bay, including fish, whooping cranes, and blue crabs?

3. ED Issue #3: Whether an impact statement should be made concerning the existing pond and San Antonio Bay?

The ED 2007 Response recommends that this issue not be referred for hearing because an Environmental Impact Statement ("EIS") is not required by state law. The PIC does not identify this issue. The Applicant concurs that this issue is not referable to SOAH.

The National Environmental Policy Act ("NEPA") requires an Environmental Impact Statement ("EIS") only if a federal agency undertakes a major federal action significantly affecting the human environment. 42 U.S.C. § 4332(2)(C). An EIS may, therefore, be required for certain major actions, but only if undertaken by a federal agency. For wastewater discharge permits, an EIS may be required only for EPA-issued National Pollutant Discharge Elimination System ("NPDES") permits, and only if EPA determines after environmental assessment that issuance of the permit will significantly affect the human environment. See 40 C.F.R. § 122.29(c)(1)(i). In any event, an EIS is not required for state-issued permits, such as Texas Pollutant Discharge Elimination System ("TPDES") permits issued by TCEQ. *Id.* § 122.19(c)(1)(ii).

4. ED Issue #4: Whether whooping cranes and other wildlife will be adversely affected by this facility and discharge?

The issue of "whooping cranes and other wildlife" identified in the ED's 2007 Response duplicates ED Issue #2 and PIC Issue #1 and should not be referred separately to SOAH for hearing. In addition, for the reasons discussed above in Part III.C of this Response, Applicant contends that this issue has been too broadly stated by the ED and PIC. If this issue is referred at all, it should be formulated to specifically determine if the application meets water quality and permitting standards previously promulgated by TCEQ relevant to the issue, as follows:

Whether the proposed discharge meets applicable water quality and domestic wastewater discharge permitting standards relevant to the protection of whooping cranes in the San Antonio Bay?

5. ED Issue #5: Whether the discharge location should be moved?  
PIC Issue #2: Should the proposed discharge point be moved?

The ED's 2007 Response recommends that this issue not be referred to hearing because it is not within TCEQ's authority to require the Applicant to move the discharge point or to evaluate alternative discharge locations to the location proposed by the Applicant. The PIC's 2007 Response recommends that this issue be referred to hearing on the grounds that it "concerns 30 TAC Chapter 309" and is, therefore (according to the PIC), relevant and material to the Commission's decision on this application. The Applicant concurs with the ED's 2007 Response that this issue is not referable. This is a question of law that the Commission should decide before hearing, if granted.

Chapter 309 of TCEQ's rules set location standards for domestic wastewater treatment facility, but it does not authorize TCEQ to require the Applicant to evaluate alternative locations as part of the permitting process. Chapter 309 was adopted in 1990 to replace older design criteria previously contained in Chapter 317 (relating to Design Criteria for Sewerage Systems). See 14 Tex. Reg. 4892 (Sept. 22, 1989) (proposing 30 TAC §§ 309.10-.14). The Chapter 317 design criteria had often been applied after the permitting process was complete. The location standards were moved to Chapter 309 because they were considered matters "that the commission is concerned with as a normal part of permit issuance." 15 Tex. Reg. 1160, 1161 (Mar. 2, 1990). Neither the

rules nor the preambles to the Chapter 309 location standards express any intent by the agency to require evaluation of alternative sites as part of the permitting process for domestic wastewater treatment facilities.

For the foregoing reasons, the TCEQ lacks authority to consider the broad issue as formulated by the ED and PIC of “[w]hether the discharge location should be moved?” The only issue for consideration under the law applicable to the application is whether the facility meets the location standards set out in Chapter 309. If this issue is referred to hearing, therefore, it should specifically determine:

Whether the proposed facility and discharge satisfy the location standards for domestic wastewater treatment facilities in Subchapter B of Chapter 309 of the Commissions rules?

6. ED Issue #6: Whether the discharge will adversely effect oyster reefs and sea grass?  
PIC Issue #3: Will the proposed discharge adversely affect sea grasses?  
PIC Issue #4: Will the proposed discharge adversely affect oyster reefs?

Both the ED and the PIC recommended referral of this issue for hearing in their 2007 Responses. For the reasons discussed in Part III.C, above, the Applicant contends that this issue is too broadly formulated for referral. The relevant inquiry is whether the proposed discharge satisfies the previously promulgated water quality and permitting standards relevant to the protection of sea grasses or oyster reefs, or both. The Applicant therefore requests that the Commission reformulate the issue as follows:

Whether the facility and discharge point satisfy the applicable water quality and permitting standards relevant to the protection of sea grasses and oyster reefs in the San Antonio Bay.

7. ED Issue #7: Whether there is adequate information on the proposed flow due to the width of the discharge point stream segment?

One hearing requester contended that TCEQ had not adequately considered the width of the receiving waters at the discharge point. *See* Comments of Dudley and Patsy Garrett (June 28, 2007), at page 2-3. The ED recommends referral of this issue on the summary grounds that “[t]his issue is within TCEQ’s jurisdiction and is relevant and material to TCEQ’s decision on the permit application.” The PIC does not identify this issue for referral.

The Applicant urges the Commission not to refer this issue to SOAH. The Applicant is unaware of any issue that would be relevant and material to the Commission’s decision on which the width of the discharge point would make any difference. The hearing requesters appear to have raised the width of the discharge point as somehow providing evidence of their contention that the volume of effluent will be

more than the 25,000 gallons per day allowed by the draft permit. The permit clearly limits the discharge to 25,000 gallons per day. If the discharge exceeds that amount, the facility would be in violation of the permit. The width of the discharge point is, therefore, not relevant and material to the Commission's decision on the application.

8. ED Issue #8: Whether the chlorine and addition of fresh water from the discharge will affect the normal salinity of San Antonio Bay and affect aquatic health?  
PIC Issue #5: Will the proposed discharge change the salinity of San Antonio Bay?

The ED's 2007 Response justifies referral of this issue on the summary basis that it is "within TCEQ's jurisdiction." The PIC's 2007 Response justifies referral on the grounds that "[t]his issue involves the Texas Surface Water Quality Standards found in 30 TAC Chapter 307 and is therefore relevant and material to the Commission's decision on this application." For the reasons discussed in Part III.C of this Response, the ED's and PIC's formulations of this issue are too broad. The relevant inquiry is whether the proposed discharge satisfies the previously promulgated water quality and permitting standards relevant to salinity in bays and estuaries. If this issue is referred, the Applicant requests that the issue be formulated as follows:

Whether the proposed discharge satisfies the applicable water quality and permitting standards relevant to salinity in and around the San Antonio Bay?

9. ED Issue #9: Whether the discharge will stagnate in San Antonio Bay?  
PIC Issue #6: Will depth, wind, and tidal influences cause the effluent to stagnate and not leave the bay?

The ED's 2007 Response justifies referral of this issue on the summary basis that it is "within TCEQ's jurisdiction." The PIC's 2007 Response justifies referral on the grounds that "[t]his issue involves the Texas Surface Water Quality Standards found in 30 TAC Chapter 307 and is therefore relevant and material to the Commission's decision on this application." For the reasons discussed in Part III.C of this Response, the ED's and PIC's formulations of this issue are too broad. The relevant inquiry is whether the proposed discharge will satisfy the previously promulgated water quality standards in light of the alleged potential for inadequate mixing. If this issue is referred, the Applicant requests that the issue be formulated as follows:

Whether the proposed discharge will cause violations of applicable water quality standards in light of the depth, wind, and tidal influences in the vicinity of the discharge point to San Antonio Bay?

10. ED Issue #10: Whether this facility will lead to increased flooding causing sewage overflows and property damage?

PIC Issue #7: Could flooding cause sewage from the proposed facility and effluent from the discharge route to overflow onto residential property and into San Antonio Bay?

The ED's 2007 Response recommends that the Commission not refer this issue to SOAH for hearing. The PIC recommends referral on the grounds that "[t]his issue concerns 30 TAC Chapter 309 and is therefore relevant and material to the Commission's decision on the application." The Applicant agrees with the ED that the Commission should not refer this issue to SOAH for hearing.

Flooding, if any, occurring on the hearing requesters' property cannot reasonably be attributed to the small proposed volume of effluent discharge. This is clear from the fact that the requesters state that they are currently experiencing flooding, and the discharge has not yet commenced. Flooding, if any, is caused by runoff from storm events, not the wastewater discharge. As noted in the ED's 2007 Response, control of flooding from storm events is beyond TCEQ's jurisdiction and is not relevant to the Commission's decision on the permit under the law applicable to a domestic wastewater discharge permit.

Treated effluent from the facility is discharged to storm water detention/retention ponds on Applicant's property where it commingles with storm water runoff stored in those ponds. When the outflow from these ponds, including the treated effluent, leaves Applicant's property, it becomes water of the state, indistinguishable from other water flowing in the unnamed ditch and subject to appropriation by others for beneficial uses. Control of flooding by waters of the state is not within TCEQ's jurisdiction under the law under which the application is to be considered.

The Applicant therefore concurs with the ED's 2007 Response that this issue should not be referred to hearing. To the extent that hearing requesters are concerned about overflow of untreated sewage, this issue is duplicated by Issue #11 in the ED's 2007 Response, and should not cause referral of Issue #10 for hearing.

11. ED Issue #11: Whether this facility is protected from a 100-year flood event?

PIC Issue #7: Could flooding cause sewage from the proposed facility and effluent from the discharge route to overflow onto residential property and into San Antonio Bay?

The ED's 2007 Response recommends that this issue not be referred to hearing. The PIC's 2007 Response recommends a hearing on the issues. The Applicant concurs with the ED's 2007 Response.

The PIC's Issue #7 suggests that an issue of purported overflow of effluent from the proposed discharge route be referred to hearing. For the reasons discussed under the previous section of this Response, overflow, if any, of treated effluent from the proposed

discharge route is not within TCEQ's jurisdiction and not relevant or material to the Commission's decision under the law governing the application.

With respect to overflow of untreated sewage, consistent with TCEQ's location standards, Other Condition No. 6 of the draft permit requires the permittee to provide facilities for the protection of a 100-year flood. *See* Draft Permit Other Condition No. 6, at page 23. A Professional Engineer must verify to TCEQ that all design requirements are met, and the permittee's facility design plans are subject to review by TCEQ before construction. *See* 30 TAC § 317.1(a)(3)(D)-(E); Draft Permit Operational Requirement 8.b, at page 10; Draft Permit Other Requirements 7. To the extent that hearing requesters are concerned about overflow of untreated sewage, therefore, that issue will be addressed during TCEQ's design review, and is not an issue relevant and material to the Commission's decision on the permit.

If, however, the Commission refers this issue for hearing, the Applicant requests that it be limited to the legally relevant standard, as follows:

Whether the facility will satisfy the flood protection standard for domestic wastewater treatment facilities in 30 TAC § 309.13(a) as it relates to protection from overflow of untreated sewage?

12. ED Issue #12: Whether this facility will have adequate hurricane preparedness?

The ED's 2007 Response concluded that this issue was not relevant and material to the Commission's decision on this permit. The PIC did not identify this as an issue for referral. The Applicant concurs that this issue is not referable to SOAH. TCEQ's permitting standards do not require a hurricane preparedness plan for domestic wastewater facilities.

13. ED Issue #13: Whether this facility will affect property values?

The ED's 2007 Response concluded that this issue was not within TCEQ's regulatory authority and recommended against referral. The PIC's 2007 response, at page 10, concurred. The Applicant concurs. This issue should not be referred to SOAH.

14. ED Issue #14: Whether this facility will start out small and get bigger in the long term?

The ED's 2007 Response concluded that this issue was not relevant and material to the Commission's decision on this permit and recommended against referral. The PIC's 2007 Response did not identify this as an issue raised by the hearing requests. The Applicant concurs that this issue is not relevant and material to the Commission's decision on the permit.

The discharge volume is limited to 25,000 gallons per day by the terms of the permit. An increase in that volume would require an application for a permit amendment. *See* Draft Permit Condition 4, at page 8. An amendment application to increase the

capacity of the facility would be the subject of a separate, future decision by the Commission. It is not relevant or material to the Commission's decision on this permit. This issue should not, therefore, be referred to SOAH.

15. ED Issue #15: Whether this facility will lead to increased waterborne bacteria?

The ED's 2007 Response recommends referral of this issue. The PIC's 2007 Response did not identify this issue as having been raised by the hearing requests. Applicant believes that this issue is encompassed in ED Issue #16 and PIC Issue #10, relating to recreational and fishing impacts, and should not be separately referred to SOAH. The Applicant urges the Commission not to refer a separate issue on bacteria.

If the Commission refers a separate issue on bacteria, Applicant requests, for the reasons discussed in Part III.C of this Response, that the issue be formulated to focus the inquiry on compliance with TCEQ's previously promulgated water quality standards relevant to bacteria; specifically:

Is the discharge expected to cause a violation of the Texas water quality criteria for bacteria applicable to the receiving water bodies?

16. ED Issue #16: Whether this facility will have an affect on all forms of water recreation?  
PIC Issue #10: Will the proposed discharge adversely affect recreational uses of San Antonio Bay such as fishing, shrimping, oystering, waterfowl hunting, swimming, and water sports?

The ED's and PIC's 2007 Responses recommend referral of this issue. If the Commission refers this issue, the Applicant requests, for the reasons discussed in Part III.C of this Response, that the issue be formulated to focus the inquiry on compliance with TCEQ's previously promulgated water quality standards relevant to recreation; specifically:

Is the discharge expected to cause a violation of the applicable Texas water quality criteria for the recreation and aquatic life uses designated for the receiving water bodies in the Texas water quality standards?

17. ED Issue #17: Whether the construction at Falcon Point Ranch will lead to silt problems?

The ED's 2007 Response recommends against referral of this issue. The PIC's 2007 response does not identify this as an issue raised by the hearing requests. The Applicant concurs that this issue should not be referred to SOAH. The draft permit is limited to control of a domestic wastewater discharge. Storm water runoff during subdivision construction will be subject to TCEQ's construction general permit, if applicable, as well as applicable local erosion control requirements. Siltation, if any, is

not relevant and material to the Commission's decision on the Applicant's domestic wastewater discharge permit. The Applicant notes that it does not concede that siltation is occurring or, if the hearing requesters are experiencing siltation, that it is caused by Applicant's activities.

18. ED Issue #18: Whether this facility will lead to odor problems?

PIC Issue #11: Will the proposed facility cause nuisance odors?

The ED's 2007 Response recommends referral of this issue. The PIC concurs. The Applicant contends that there is no disputed issue of fact for hearing on this issue, and it should not be referred to SOAH. If the Commission refers this issue, the scope should be limited to determining whether the Applicant meets the promulgated permitting standard.

TCEQ's location standards for domestic wastewater facilities abate and control nuisance odors by requiring the facility to comply with one of three criteria, the choice of which is the applicant's. The applicant must either: (1) comply with buffer zone requirements using owned property; (2) submit a nuisance odor prevention request for TCEQ's approval; or (3) submit sufficient evidence of legal restrictions prohibiting residential structures within the part of the buffer zone not owned by the applicant. 30 TAC § 309.13(e). The applicant chose Option (1), and owns sufficient property around the facility to meet the buffer zone requirements. *See* ED's Amended Response to Public Comment (Nov. 15, 2007), Response #20, at page 12 ("The Applicant has satisfied Section 309.13 through ownership of the required 150 foot buffer zone area."). There can be no legitimate factual dispute on these distances, and thus there is no issue of fact on which to hold a hearing. This issue should not be referred to SOAH.

In the event that the Commission refers this issue to SOAH, the scope should be limited to determining whether the facility meets the location standards relevant to nuisance abatement; specifically:

Does the facility meet the location standard set out 30 TAC § 309.13(e)?

19. PIC Issue #8: Will the proposed discharge adversely affect water quality of San Antonio Bay?

The PIC's 2007 Response recommends referral of this issue. The ED's 2007 Response did not identify this issue as a separate issue. The Applicant urges the Commission not to refer this issue because it is already covered by the other issues recommended for referral in the ED's and PIC's 2007 Response. If this issue is separately referred, it should be formulated as:

Is the proposed discharge expected to cause a violation of the applicable Texas water quality standards for the designated uses in the receiving water bodies?



20. PIC Issue #9: Will the proposed discharge cause health hazards?

The PIC's 2007 Response recommends referral of this issue. The ED's 2007 Response did not identify this issue as a separate issue. The Applicant urges the Commission not to refer this issue for hearing. It is already covered by Issue #16, as formulated by Applicant above, to the extent that it is relevant and material to the Commission's decision on the application.

As formulated by the PIC, the scope of this issue is too broad and open ended, and could be read to extend the scope of the hearing to issues beyond the promulgated water quality and permitting standards with which the discharge must comply. If the ED refers an issue on health hazards to SOAH, the Applicant requests that the scope be stated as follows:

Is the proposed discharge expected to cause a violation of the applicable Texas water quality standards in the receiving water bodies relevant to protection of human health?

**D. Summary**

In summary, the Commission should deny the hearing requests because none of the requesters have standing as "affected persons" as defined under Section 55.203 of TCEQ's procedural rules. 30 TAC § 55.203(a). The Commission should grant the permit. In the event that the Commission refers the matter to hearing, the Commission should refer only the issues as formulated below:

- (1) ED Issue #1 relating to use of an irrigation disposal system should not be referred to SOAH. The ED's 2007 Response concurs.
- (2) ED Issue #2/PIC Issue #1 relating to wildlife, if referred, should be formulated as: "Whether the proposed discharge meets applicable water quality and domestic wastewater discharge permitting standards relevant to the protection of wildlife and marine life in the San Antonio Bay, including fish, whooping cranes, and blue crabs?"
- (3) ED Issue #3 relating to an impact statement should not be referred to SOAH. The ED's 2007 Response concurs.
- (4) ED Issue #4 duplicates ED Issue #2 and should not be referred. If referred, ED Issue #4 should be formulated as: "Whether the proposed discharge meets applicable water quality and domestic wastewater discharge permitting standards relevant to the protection of whooping cranes in the San Antonio Bay?"
- (5) ED Issue #5/PIC Issue #2 relating to moving the discharge point should not be referred. The ED's 2007 Response concurs. The PIC's 2007 Response recommends referral. Requiring an

applicant to evaluate alternative discharge points is beyond the scope of TCEQ's regulatory authority. If referred, however, the issue should be formulated as: "Whether the proposed facility and discharge satisfy the location standards for domestic wastewater treatment facilities in Subchapter B of Chapter 309 of the Commissions rules?"

- (6) ED Issue #6 regarding oyster reefs and sea grasses duplicates ED Issue #2 and should not be referred. If ED Issue #2 is referred, it should be formulated as: "Whether the facility and discharge point satisfy the applicable water quality and permitting standards relevant to the protection of sea grasses and oyster reefs in the San Antonio Bay."
- (7) ED Issue #7 regarding the width of the discharge point is not relevant and material to the Commission's decision on the application and should not be referred.
- (8) ED Issue #8/PIC Issue #5 regarding salinity, if referred to SOAH, should be formulated as follows: "Whether the proposed discharge satisfies the applicable water quality and permitting standards relevant to salinity in and around the San Antonio Bay?"
- (9) ED Issue #9/PIC Issue #6 regarding stagnation, if referred to SOAH, should be formulated as follows: "Whether the proposed discharge will cause violations of applicable water quality standards in light of the depth, wind, and tidal influences in the vicinity of the discharge point to San Antonio Bay?"
- (10) ED Issue #10 should not be referred to SOAH. The ED's 2007 Response concurs. The PIC recommends referral. To the extent this issue relates to flooding from storm water runoff and/or treated effluent is not within TCEQ's jurisdiction and to the extent it relates to untreated sewage it is duplicative of ED Issue #11. ED Issue #10 should not be referred to SOAH.
- (11) ED Issue #11/ED Issue #7, if referred to SOAH, should be formulated as: "Whether the facility will satisfy the flood protection standard for domestic wastewater treatment facilities in 30 TAC § 309.13(a) as it relates to protection from overflow of untreated sewage?"
- (12) ED Issue #12 regarding hurricane preparedness should not be referred to SOAH as it is not relevant and material to the Commission's decision on the application. The ED's 2007 Response concurs.

- (13) ED Issue #13 regarding property values should not be referred to SOAH as it is not within TCEQ's jurisdiction. The ED's and PIC's 2007 Responses concur.
- (14) ED Issue #14 regarding capacity increases should not be referred to SOAH as it is not relevant and material to the Commission's decision on this application. The ED's 2007 Response concurs.
- (15) ED Issue #15 regarding bacteria is duplicative of ED Issue #16 and should not be referred. If ED Issue #15 is referred, it should be formulated as: "Is the discharge expected to cause a violation of the Texas water quality criteria for bacteria applicable to the receiving water bodies?"
- (16) ED Issue #16 regarding water recreation, if referred, should be formulated as: "Is the discharge expected to cause a violation of the applicable Texas water quality criteria for the recreation and aquatic life uses designated for the receiving water bodies in the Texas water quality standards?"
- (17) ED Issue #17 regarding alleged silt problems is not relevant and material to the Commission's decision on a domestic wastewater discharge permit and should not be referred to SOAH for hearing. The ED's 2007 Response concurs.
- (18) ED Issue #18 regarding odors does not present a disputed issue of fact for hearing and should not be referred. If referred, the issue should be formulated as: Does the facility meet the location standard set out 30 TAC § 309.13(e)?
- (19) PIC Issue #8 regarding water quality duplicates the other issues recommended for referral by the ED and PIC and should not be referred to SOAH. If referred, it should be formulated as: "Is the proposed discharge expected to cause a violation of the applicable Texas water quality standards for the designated uses in the receiving water bodies?"
- (20) PIC Issue #9 regarding health hazards duplicates ED Issue #16 and should not be referred to SOAH. If referred, it should be formulated as: "Is the proposed discharge expected to cause a violation of the applicable Texas water quality standards in the receiving water bodies relevant to protection of human health?"

If referred, the Commission should allow six months for the hearing, from the date of the preliminary hearing until presentation of a proposal for decision to the Commission.

#### **IV. Requests for Reconsideration Should Be Denied**

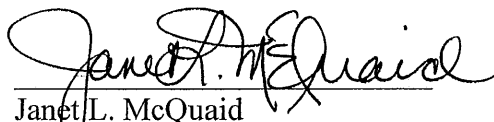
The Commission received requests for reconsideration from several persons. The Executive Director has determined that the proposed facility and discharge meet the applicable regulatory standards, and that the Commission should grant the permit. The Executive Director filed responses to comment on the draft permit in June 2007 and November 2007. The requests for reconsideration did not present new information that would affect the Commission's decision on the application. The requests for reconsideration should be denied.

#### **V. Conclusion**

The Applicant requests that the Commission:

- (1) Deny the requests for reconsideration.
- (2) Deny the requests for hearing.
- (3) Grant the permit.
- (4) If referred to SOAH, limit the hearing to six months duration from the time of the preliminary hearing to presentation of a proposal for decision to the Commission.
- (5) If referred to SOAH, limit the number of issues and formulate the scope as described in that Part III.C (and summarized in Part III.D) of this Response.

Respectfully submitted,



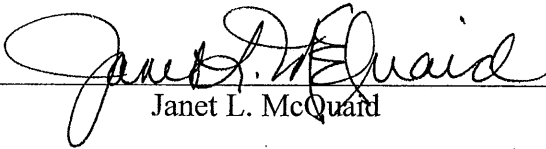
Janet L. McQuaid  
Texas Bar No. 00784580  
Craig M. Douglas  
Texas Bar No. 24003635

Smith-Robertson L.L.P.  
221 West Sixth Street, Suite 1100  
Austin, TX 78701  
512-225-1702 office  
512-225-1705 facsimile

COUNSEL FOR APPLICANT

## CERTIFICATE OF SERVICE

I certify that on February 1, 2007, the original and eleven true and correct copies of the "Applicant's Response to Hearing Request" relating to the application of Seadrift Ranch Partners for Permit No. 14716001 were filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via courier, facsimile transmission, or by deposit in the U.S. Mail.

  
Janet L. McQuaid

CHIEF CLERKS OFFICE

2008 FEB - 1 PM 12:49

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**MAILING LIST**  
**SEADRIFT RANCH PARTNERS, LTD.**  
TCEQ DOCKET NO. 2007-1052-MWD

FOR THE APPLICANT:

Janet L. McQuaid  
Craig M. Douglas  
Smith-Robertson, L.L.P.  
221 West 6<sup>th</sup> Street, Suite 1100  
Austin, Texas 78701  
Tel: (512) 225-1702  
Fax: (512) 225-1705

Bill Ball, Manager  
Seadrift Ranch Partners, Ltd.  
816 Congress Ave., Ste. 1280  
Austin, Texas 78701-2476  
(Via Courier)

Thomas Schmidt  
Urban Engineering  
2004 Commerce St.  
Victoria, Texas 77901-5510  
Tel: (361) 578-9836  
Fax: (361) 576-9924  
(Via U.S. Mail)

FOR THE CHIEF CLERK:

(Via Courier)  
LaDonna Castanuela  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

Building F, Room 1101  
12100 Park 35 Circle  
Austin, Texas 78753  
Tel: (512) 239-3300

FOR THE EXECUTIVE DIRECTOR:

(Via Certified Mail)  
Michael Northcutt, Jr., Staff Attorney  
Texas Commission on Environmental  
Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

FOR OFFICE OF PUBLIC ASSISTANCE:

(Via Certified Mail)  
Bridget Bohac, Director  
Arthur Garrett, Attorney  
Texas Commission on Environmental  
Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE  
RESOLUTION:

(Via Certified Mail)  
Kyle Lucas  
Texas Commission on Environmental  
Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

REQUESTERS:

(Via Certified and U.S.. Mail)  
Daniel Cervenka  
223 Mary Ann Dr.  
Canyon Lake, Texas 78133-5368

Virginia Cervenka  
701 Windrock Dr.  
San Antonio, Texas 78239-2628

Rick Dierlam  
P.O. Box 952  
Seadrift, Texas 77983-0952

Dudley W. & Patsy A. Garrett  
508 Burt St.  
Yoakum, Texas 77995-3922

Carol J. Garriott  
P.O. Box 28  
Seadrift, Texas 77983-0028

**MAILING LIST**  
**SEADRIFT RANCH PARTNERS, LTD.**  
**TCEQ DOCKET NO. 2007-1052-MWD**

Jeffrey & Terri Kubena  
1103 Swan Point Rd.  
Seadrift, Texas 77983-4403

Franklin Pierce  
111 Fairlane Dr.  
Round Rock, Texas 78664-7511

Christie & Greg Waida  
P. O. Box 4581  
Victoria, Texas 77903-4581